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FILED
NOV 3 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 98-388
In the Supreme Court of the United States
October Term, 1998

RUSSELL H. VOLKEMA and
LOIS J. VOLKEMA,

Petitioners,

v.

STATE OF MICHIGAN;
DEPARTMENT OF ENVIRONMENTAL
QUALITY, and RUSSELL HARDING,
Director of Department of Environmental Quality,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE MICHIGAN SUPREME COURT

BRIEF OF RESPONDENTS IN OPPOSITION

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COUNTER-STATEMENT OF QUESTION PRESENTED

When a property owner is denied a permit to fill 4.3 acres of wetland does the Constitution require a court to focus only on the 6 acres which allegedly cannot be commercially developed due to that decision in determining whether a taking has occurred or, consistent with longstanding takings jurisprudence, should the court consider the entire undeveloped 24.6 acre parcel of property currently owned by the property owner?

LIST OF PARTIES

In the courts below, the State of Michigan, the Michigan Department of Natural Resources (MDNR) and its Director, Roland Harmes, were listed as respondents. In 1995 the Michigan Department of Environmental Quality (MDEQ) was created and assumed the obligations and authority for the regulatory scheme under which the permit decision at issue was rendered. Executive Reorganization Order 1995-18, Mich Comp. Laws Ann. § 324.99903 (West Supp. 1998). Russell J. Harding has succeeded Roland Harmes as MDEQ's Director. Director Harding and the Michigan Department of Environmental Quality are automatically substituted as parties. Supreme Court Rule 3.5.3. All three respondents will be collectively referred to as "MDEQ."

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OPINIONS BELOW

Petitioners' Application for Leave to Appeal to the Michigan Supreme Court was denied in an Order dated June 9, 1998. *Volkema v. Department of Natural Resources*, 457 Mich. 884 (1998). The application for leave to appeal had been held in abeyance pending the Michigan Supreme Court's decision in *K & K Construction v. Department of Natural Resources*, 456 Mich. 570; 575 N.W.2d 531 (1998), *cert. den.* ___ U.S. ___ (1998).

The Michigan Court of Appeals decision in the underlying case is reported as *Volkema v. Department of Natural Resources*, 214 Mich. App. 66; 542 N.W.2d 282 (1995). The various state Court of Claims opinions are not published.

The pertinent orders and opinions are reproduced as Appendices A-E to the Petition.[1] Respondents have not attached these documents to this brief and will reference Petitioners' Appendices as required.

JURISDICTION

Respondents do not dispute Petitioners' statement concerning the jurisdiction of the Court.

STATEMENT OF THE CASE

Respondents, the State of Michigan, the Michigan Department of Environmental Quality and Russell Harding, Director of the Michigan Department of Environmental Quality ("MDEQ"), will primarily rely on the recitation of facts contained in the Michigan Court of Appeals opinion in the underlying case. 214 Mich. App. at 66-67; Petitioners' Appendix B, pp. 1-2. This concise, two- paragraph narration adequately presents the factual background in this case for purposes of addressing the issue raised by Petitioners.

However, two areas of potential confusion should be clarified. The first involves the nature of the government action at issue which, contrary to Petitioners' rhetoric, was

[1] Petitioners cite to an "Appendix F" in their Petition. However, there was no Appendix F appended to Respondents' copy of the Petition.

solely the denial of Petitioners' permit application to fill an area of wetland under the former Goemaere-Anderson Wetland Protection Act ("WPA"), Mich. Comp. Laws Ann. § 281.701 *et seq* (West 1979),[2] for purposes of a proposed commercial development. Trial Exhibits E and F; Petitioners' Appendix B, p. 2. Nothing in the government's decision on that application requires that Petitioners allow the government or the general public to enter their property, that they take any affirmative action to maintain the wetland, or that they utilize the property in any particular way. Petitioners' persistent characterization of the government action in this matter as requiring that a portion of their property be "pressed into public use or service," "devoted exclusively to public use" or "dedicated for use exclusively as a wetlands preserve" (*see, e.g.*, Petition, pp. 4, 5, 6, 16, 19, 25, and 26), raises the specter of permanent government invasion, public easements, or affirmative deed restrictions none of which occurred in this case.

Additionally, the Court of Appeals statement that, "approximately half of that land [Petitioners' 50 acres of property] already had been developed before the enactment of the Wetland Protection Act"[3] is erroneous. The WPA was enacted in 1979 and became effective in October of 1980. The testimony of Mr. Volkema at trial established that 26 of the 50 acres were sold between August of 1981 and August of 1987, in four separate transactions, for a total of $1.987 million. November 9, 1992 Trial Transcript, pp. 21-24. On the basis of this erroneous determination, the Court of Appeals excluded the 26 acres from its takings analysis.[4] The MDEQ cross-appealed in the Court of Appeals and sought application for leave to appeal as a cross-appellant in the Supreme Court in order to challenge the lower courts' exclusion of the 26 acres of the original 50 acre parcel owned by the Volkemas in determining the relevant parcel. The application for leave to

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[2] The Wetland Protection Act has since been recodified as Part 303 of the Natural Resources and Environmental Protection Act ("NREPA"), Mich. Comp. Laws Ann. § 324.30301 *et seq* (West Supp. 1998) without substantive change.

[3] 214 Mich. App. at 73-74; Petitioners' Appendix B-7.

[4] The trial court had also excluded the 26 acres without detailed explanation. June 18, 1992 Opinion and Order.

appeal as cross-appellant was denied by the Michigan Supreme Court in the same order denying petitioners' application. Petitioners' Appendix A-1.

REASONS FOR DENYING THE WRIT

I.

BECAUSE OF ITS UNIQUE FACTS AND PROCEDURAL POSTURE THIS IS AN INAPPROPRIATE CASE TO RESOLVE THE QUESTION RAISED IN THE PETITION.

MDEQ wishes to highlight an important aspect of the procedural background in this matter not fully addressed by Petitioners. Petitioners purport to be seeking issuance of a writ of certiorari to review the Michigan Court of Appeals decision in this case. Specifically, Petitioners seek review of the opinion as it concerns the determination of the relevant parcel in a regulatory takings case. Petition, p. 1. However, the Michigan Court of Appeals opinion is not the controlling authority on that issue in the State of Michigan. Rather, the test to be applied by the courts in Michigan is governed by the Michigan Supreme Court's opinion in *K & K Construction, supra*.[5] The Order of the Michigan Supreme Court disposing of Petitioners' Application for Leave to Appeal in the underlying case makes it clear that the analysis of the Michigan Court of Appeals is not controlling to the extent it is inconsistent with *K & K Construction*:

> The application is again considered, and it is DENIED, because we are not persuaded that the question presented should be reviewed by this Court. The result reached by the Court of Appeals is correct pursuant to this Court's decision in *K & K Construction, Inc., supra*. The Court of Appeals' analysis, particularly its reliance on *Loveladies Harbor, Inc. v. United*

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[5] The Petition for a Writ of Certiorari in *K & K Construction, Inc. v. Department of Natural Resources and Michigan*, No. 97-1957, was recently denied by this Court in an order dated October 5, 1998. That Petition, also authored by the Pacific Legal Foundation, similarly sought to have this Court address the relevant parcel issue.

States, 28 F 3d 1171 (1994), is disavowed insofar as it is inconsistent with this Court's decision in *K & K Construction*.[6]

Petitioners seek to have this Court review the decision of the Michigan Court of Appeals for the purpose of arguing for the adoption of a new "partial categorical taking" rule, Petition, p. 7, but this case is an inappropriate vehicle for exploring any such new principle for several reasons. First, the Michigan Supreme Court has severely limited any precedential authority of the Court of Appeals opinion by expressly disavowing, at least in part, its analysis. Petitioners are seeking review of a result, not a rationale. Second, Petitioners rely on a dissenting opinion in the Michigan Court of Appeals. Petition, p. 27. Third, Petitioners have failed to demonstrate any tenable legal authority or policy basis for the new "per se" rule they advocate. Fourth, the alleged conflicts between opinions they rely upon are illusory. The petition should be denied.

II.

THE DECISION OF THE MICHIGAN COURT OF APPEALS IS CONSISTENT WITH ESTABLISHED PRECEDENT OF THIS COURT, AS WELL AS THE LOWER FEDERAL COURTS.

Petitioners essentially acknowledge that the rule they propose is not supported by existing legal authority. Petition, p. 27. The rule Petitioners would have this Court adopt is the view of the dissenting judge in the Michigan Court of Appeals below that, "[A] taking occurs where a regulation precludes the use of an identifiable, discrete piece of property, even if that property forms only a portion of a larger parcel." 214 Mich. App. at 80; Petitioners' Appendix B-13. Such a rule would represent a radical departure from this Court's established takings jurisprudence and would fundamentally alter the playing field for regulators and private parties. By comparison, the decision of the Court of Appeals represents a

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6 457 Mich. 884; Petitioners' Appendix A.

"mainstream" analysis of the relevant parcel issue[7] which is consistent with a long line of decisions from this Court and the emerging rule in the lower federal courts.

A. The Court Of Appeals Decision To Not Limit Its Analysis To The Discrete Portion Of The Property Impacted By The Government Action Is Consistent With This Court's Longstanding Precedent.

The genesis of the modern "parcel-as-a-whole" or "non-segmentation" doctrine is *Penn Central Transportation Co. v New York City*, 438 U.S. 104 (1978), wherein this Court dismissed the argument that the "air rights" impacted by a landmarks ordinance were taken "irrespective of the value of the remainder of their parcel. . . ." 438 U.S. at 130. Instead this Court held that "'Taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated." *Id. See also, Andrus v. Allard*, 444 U.S. 51, 65-66 (1979) ("where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking because the aggregate must be viewed as a whole").

To the extent there was any ambiguity concerning the scope of this rule, in *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470 (1987), this Court made it clear that even if it was alleged that discrete portions of a claimant's property were taken in their entirety, as opposed to "strands" or rights in a piece of property, the focus would still not be limited to the impacted areas. 480 U.S. at 498-502. In *Keystone*, an identifiable 27 million tons of coal were required to be left in place as a result of Pennsylvania's Subsidence Act and, consequently, would have no value to the claimant. *Id.* at 498. The claimants accordingly sought to "narrowly define certain segments of their property and assert that, when so defined, the Subsidence Act denies them economically viable use." *Id.* at 496. In rejecting this strategy, the Court made it clear that this rule did not simply apply to vertical rights in

[7] As discussed, *supra*, MDEQ believes the entire 50-acre parcel, which was still undeveloped when the WPA was enacted, should have been included in the relevant parcel.

land, *e.g.*, air or mineral rights, but also applied horizontally: Many zoning ordinances place limits on the property owner's right to make profitable use of *some segments of his property*. A requirement that a building occupy no more than a specified percentage of the lot on which it is located could be characterized as a taking of the vacant area as readily as the requirement that coal pillars be left in place. Similarly, under petitioners' theory one could always argue that a setback ordinance requiring that no structure be built within a certain distance from the property line constitutes a taking because *the footage represents a distinct segment of property* for takings law purposes.[8]

Petitioners assert that the language in footnote 7 of the opinion in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992),[9] opened the door to revision of the rule established in *Penn Central* and *Keystone*. Petition, pp. 6 and 27. However, whatever may have been the import of that language, this Court has not subsequently indicated that it was prepared to contemplate a rule such as that proposed by Petitioners. To the contrary, in *Concrete Pipe and Products of California Inc. v. Construction Laborers Pension Trust*, 508 U.S. 602, 644 (1993), the Court emphatically disavowed any intention to adopt such a rule:

> [W]e rejected this analysis years ago in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 130-131 (1978), where we held that a claimant's parcel of property could not first be divided into what was taken and what was left for the purpose of demonstrating the taking of the former to be complete and hence compensable. *To the extent that any portion of property is taken, that portion is always taken in its entirety; the relevant question, however, is whether the property taken is all, or only a portion of the parcel in question.*[10]

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[8] 480 U.S. at 498 (emphasis added).

[9] 505 U.S. at 1016 n. 7.

[10] Emphasis added.

Moreover, in a case involving the required dedication of a portion of real property to the government, *Dolan v Tigard*, 512 U.S. 374, 384 n. 5 (1994), this Court, citing *Lucas*, opined, "There can be no argument that the permit conditions would deprive petitioner of 'economically beneficial us[e]' of her property as she currently operates a retail store on the lot. Petitioner assuredly is able to derive *some* economic use from her property." (Emphasis in the original).

B. Lower Federal Courts Which Have Addressed The Relevant Parcel Issue Have Reached Conclusions Consistent With The Michigan Court Of Appeals And Have Expressly Rejected The Type Of "Per Se" Rule Advocated By Petitioners.

In Section III, *infra*, the only three cases which Petitioners have identified as being in conflict with the Michigan Court of Appeals are specifically addressed. Even a cursory analysis of those cases demonstrates that there is no serious conflict in principle created by the opinions in those cases. Moreover, it is clear that a number of federal circuit and state courts, which have directly addressed the relevant parcel issue, reject the notion that discrete portions of a larger property must be viewed separately in measuring the impact of a government regulation. *See, e.g., MacLeod v. Santa Clara County*, 749 F.2d 541, 547 (9th Cir. 1984), *cert. den.* 472 U.S. 1009 (1985); *Mountain States Legal Foundation v. Hodel*, 799 F.2d 1423, 1430 (10th Cir. 1986), *cert. den.* 480 U.S. 951 (1986) (*citing MacLeod, supra*); *Naegele Outdoor Advertising v. City of Durham*, 844 F.2d 172, 176 (4th Cir. 1988); *Forest Properties, Inc. v. United States*, 39 Fed. Cl. 56, 74 (1997); *Zealy v. City of Waukesha*, 548 N.W.2d 528, 533 (Wis. 1996).

In addition to these cases, and of particular relevance to the underlying case, are a series of takings cases based on actions taken by the federal government under the Clean Water Act ("CWA"), 33 U.S.C. § 1251 *et seq*. These cases are significant because they involve the same kind of government action which is the subject of the Petitioners' takings claim, *i.e.*, permit denials for wetland fill. Importantly, all of these cases repudiate the existence of any legal authority or public interest

justification for the Petitioners' proposed per se rule requiring that discrete portions of affected property be parsed out from a larger whole.

Deltona Corp. v. United States, 657 F.2d 1184 (Ct. Cl. 1981), *cert. den.* 455 U.S. 1017 (1982); *Jentgen v. United States*, 657 F.2d 1210 (Ct. Cl. 1981), *cert. den.* 455 U.S. 1017 (1982); *Ciampitti v. United States*, 22 Cl. Ct. 310 (1991); and *Tabb Lakes, Ltd. v. United States*, 10 F.3d 796 (Fed. Cir. 1993), each involved the application of § 404 of the CWA to property that contained both wetland and upland. In none of these cases did the courts consider the denial of a permit to fill a wetland an, "attempt to carve out a discrete portion of the owner's property and require it to be devoted to some public use",[11] mandating compensation for those specific wetland areas.

The discussion of the relevant parcel issue in *Ciampitti* and *Tabb Lakes* is particularly instructive. *Tabb Lakes* involved a temporary taking claim based on the improper assertion of jurisdiction by the Army Corps of Engineers.[12] In responding to the claimant's argument that all use of certain areas of the property had been taken the court held:

> Clearly, the quantum of land to be considered is not each individual lot containing wetlands or even the combined area of wetlands. If that were true, the Corps' protection of wetlands via a permit system would, ipso facto constitute a taking in every case where it exercises its statutory authority.[13]

Similarly, in *Ciampitti* the Court of Claims reasoned:

> In the case of a landowner who owns both wetlands and adjacent uplands, it would clearly be unrealistic to focus exclusively on the wetlands, and ignore whatever rights might remain in the uplands. If a governmental entity

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11 *See, e.g.*, Petition, p. 16.

12 10 F.3d at 799.

13 *Id.* at 802.

> required a buffer, for example, around a housing development, a court would not entertain a separate claim for the land dedicated to the buffer. It would no doubt take into consideration the extent to which the whole parcel could be developed.[14]

These cases are directly applicable to the situation presented in the underlying case where Petitioners argue that they should be compensated for the discrete area impacted by the regulation regardless of the large area of developable land remaining on their property. These cases reaffirm the doctrine established in *Keystone* and *Penn Central, supra,* which reject such claims.

III.

PETITIONERS HAS FAILED TO DEMONSTRATE ANY COMPELLING NEED TO ADOPT THE RULE THEY ADVOCATE, AND THE RULE CONTRAVENES SETTLED TAKINGS DOCTRINE.

As discussed above, despite the opportunity to opine on the subject after *Lucas,* in *Concrete Pipe* and *Dolan, supra,* this Court has not indicated any intention to create a special rule for "partial categorical takings" as proposed by Petitioners. Moreover, the federal circuit has directly addressed the issue, and rejected the propriety of such a rule in *Tabb Lakes, supra.*[15] In fact, the emerging rule for defining the relevant parcel, as represented by cases like *Loveladies Harbor, Inc. v. United States,* 28 F.3d 1171 (Fed. Cir. 1994), *Ciampitti,* and *K & K Construction, supra,* is a fact-based inquiry designed to "identify the parcel as realistically and fairly as possible."[16] Such a rule is consistent with traditional takings analysis which has relied on *ad hoc,* factual inquiries and is based on the fundamental underpinning of fairness.

Undaunted, Petitioners seek to demonstrate the need for imposition of a bright-line rule in the context of this case.

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[14] 22 Ct. Cl. at 318.

[15] As discussed in Section III.B., *infra, Loveladies* is not to the contrary.

[16] *See, e.g., Ciampitti,* 22 Ct. Cl. at 319.

However, Petitioners have failed to do so, in large part because their arguments are based on mischaracterization of the government action at issue and the application of inapposite jurisprudential principles.

As noted in MDEQ's statement of the case, Petitioners take great pains to characterize the permit denial at issue as a physical taking with the obvious aim of shoehorning this case into the analysis employed in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), and its progeny, where the determination of the relevant parcel is irrelevant. However, the record clearly discloses that this is not a physical takings case because there has been no physical occupation nor is there any support for Petitioners' assertion that MDEQ has "exercised complete dominion and control." Despite Petitioners' characterization to the contrary,[17] the fundamental underpinning of *Loretto* is the loss of the right to exclude others,[18] which is simply not at issue in this case.

Unlike a physical taking, the restriction in this case is precisely analogous to setbacks, buffer zones, height restrictions, septic requirements, etc., which preclude development of specific areas or segments of property, and control where and how property is utilized. Such restrictions have long been upheld despite the significant use limitations they impose, and the cases have been decided by reference to the whole property and the uses that remain.[19] An exception such as that proposed by Petitioners, based on the "independent economic viability" of the discrete portion of property subject to the regulation, would turn traditional parcel analysis on its head. Such micro-examination of areas or segments of property impacted by regulation, without reference to the larger whole, is antithetical to the parcel-as-a-whole principle established by this Court because it places the focus on what was taken without any point of reference.[20]

[17] Petition, p. 17. ("Although usually classified as a 'physical invasion' case, *Loretto* is perhaps better characterized as one in which the state dictated the specific use to which part of Mrs. Loretto's property would be devoted.")

[18] 458 U.S. at 435.

[19] *See, e.g., Gorieb v Fox*, 274 U.S. 603 (1927).

[20] It is significant that, to MDEQ's knowledge, this "test" has never been applied by a court.

Petitioners have failed to demonstrate any compelling reason to alter established takings jurisprudence and create a new rule to accommodate their taking claim. This is not a physical takings case and there is nothing to distinguish the permit denial at issue from any of a range of legitimate government actions which impact the use of a portion of a larger property. Accordingly, there is no reason to analyze this case, or others like it, any differently.

IV.

THERE IS NO CONFLICT BETWEEN THE VARIOUS STATE COURTS OR THE FEDERAL CIRCUIT COURTS NECESSITATING THE INVOLVEMENT OF THIS COURT.

Recognizing that this Court must reserve its oversight to cases of significant jurisprudential importance, Petitioners seek to create a conflict worthy of this Court's attention. This effort fails, not only because the conflict constructed by Petitioners, one state court out of fifty and two federal circuit courts, would be insignificant, but, more importantly, because the conflict is illusory.

A. The Oregon Supreme Court's Decision In *Boise Cascade Corp. v Board of Forestry* Was Limited To The Interpretation Of The Oregon Constitution And Did Not Directly Address The Relevant Parcel Issue.

Petitioners argue that in *Boise Cascade Corp. v Board of Forestry*, 935 P.2d 411 (Ore. 1997), the Oregon Supreme Court, "arrived at precisely the opposite conclusion from the court below on the application of *federal constitutional law*." Petition, p. 20 (emphasis added). Further, that "the Oregon Supreme Court (correctly) applied the *Takings Clause* in a manner completely contrary to the doctrine of the Michigan court below. Petition, p. 21 (emphasis added). This characterization of the holding in *Boise Cascade* is simply not accurate. Although the claimant in that case brought its claims

under the Oregon[21] and United States Constitutions, the decision of the Oregon Supreme Court was expressly limited to the state constitution:

> In order to determine whether the complaint states a claim for relief, we must first discern what is required to establish a "takings" claim under Oregon law.[13]

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[13] This Court considers state constitutional claims before considering federal constitutional claims. *State v Kennedy*, 295 Or. 260, 262, 666 P.2d 1316 (1983); *Sterling v. Cupp*, 290 Or. 611, 614, 625 P.2d 123 (1981).

It is also significant that the limited issue before the court was whether the claimant's allegations in that case were adequate to survive a dismissal motion based on the failure to state a claim, "Assuming the truth of all well-pleaded facts alleged in the complaint and giving plaintiff the benefit of all favorable inferences that may be drawn from those facts. . . ." *Boise Cascade* at 420. Among the allegations cited by the court was the somewhat unfocused allegation that, "*Apart from the the subject merchantable timber, the underlying commercial forest land has no separate economic value until the timber has been logged.*" *Id.* n. 14 (emphasis in the original). Moreover, there is no direct discussion of the relevant parcel issue.

The premise of Petitioners' conflict argument is, "It is antithetical to our constitutional form of government that rights secured under the Fifth Amendment should be protected in some states but not in others." Petition, p. 21. Although true as a general principle, Petitioners' reliance on the Oregon Supreme Court's decision in *Boise Cascade* does not support this premise because that decision was based on the Oregon Constitution and did not determinatively decide the relevant parcel issue.

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[21] Oregon Constitution, Article I, section 18.

B. The Holding In *Loveladies Harbor* Is Not In Conflict With The Michigan Court Of Appeals Opinion.

Petitioners assert that the holding in *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171 (Fed. Cir. 1994), "stands in stark contrast to the approach of the Michigan courts in the present case." Petition, p. 23.[22] This alleged conflict is apparently based on the Petitioners' view that *Loveladies* is supportive of the new "partial categorical takings" rule they advocate because the court "focus[ed] . . . on the property actually carved out for dedication to a public use by the operation of land use regulations, ..." *Id.*

Loveladies involved a permit to fill wetlands on a 250-acre parcel, which had originally been purchased in 1958, and 199 acres of which had been developed and sold prior to enactment of the relevant regulation.[23] 28 F.3d at 1173-1174. Of the remaining 51 acres, 38.5 acres had been dedicated to the State of New Jersey in exchange for a state permit to develop the remaining 12.5 acres. *Id.* When the applicant then applied to the federal government for a permit to develop the 12.5 acres, the state strenuously objected to the permit and the federal government ultimately denied it. *Id.*

It was based on this distinctive set of facts that the Federal Circuit determined that the relevant parcel was the 12.5 acres and that a taking had occurred because no development could take place in light of the permit denial. *Id.* at 1181. It is not the case that the Federal Circuit simply focused on the 12.5 acres for which the permit was sought and

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[22] This assertion is somewhat ironic in that the Court of Appeals relied upon *Loveladies* in excluding (albeit erroneously) over half of the Petitioners' original 50-acre parcel from its takings analysis. It is also ironic that *Loveladies* is often cited for a "flexible," fact-based approach to determination of the relevant parcel which is arguably similar to the "inherent[ly] factual inquiry" outlined by the Michigan Supreme Court in *K & K Construction, supra*. 456 Mich. at 580. Although the Michigan Supreme Court "disavowed" the Court of Appeals reliance on *Loveladies* (*see*, 457 Mich. 884; Petitioners' Appendix A) this was likely in large part due to the erroneous factual basis for the Court of Appeals determination that 26 acres of the 50-acre property should be excluded from the relevant parcel. In fact, *Loveladies* is cited with approval by the Michigan Supreme Court in outlining various factors of importance in determining the relevant parcel. 456 Mich. at 585 n. 10.

[23] Section 404 of the Clean Water Act, 33 U.S.C. § 1344.

denied, without any further analysis. Accordingly, the Michigan Court of Appeals properly distinguished the facts of the underlying case, where Petitioners still owned 24.6 acres of property and could develop 18.6 acres of that parcel,[24] from *Loveladies* where 199 acres had been sold before the enactment of the relevant regulation[25] and prior to the permit application 38.5 acres "for all practical purposes had been promised to New Jersey in exchange for the NJDEP permit."[26]

The Michigan Court of Appeals decision was entirely consistent with *Loveladies* and, in fact, the Court relied on *Loveladies* in excluding 26 acres of Petitioners' property from the relevant parcel. Thus, *Loveladies* does not provide any basis for Petitioners' conflict argument.

C. *American Savings And Loan Association v. County of Marin* Is Of Dubious Precedential Value.

The final case cited by Petitioner as presenting a conflict with the Michigan Court of Appeal's determination in the instant action is *American Savings And Loan Association v. County of Marin,* 653 F.2d 364 (9th Cir. 1981).

The primary reason *American Savings and Loan* does not support Petitioners' conflict argument is that two subsequent decisions in the Ninth Circuit call into question its continuing validity. In *MacLeod v. Santa Clara County, supra,*[27] a panel of the Ninth Circuit Court of Appeals took a position contrary to the holding petitioner has attributed to the *American Savings and Loan* panel. Relying on *Penn Central* the panel held that government action which denied the use of a portion of a claimant's property did not necessarily result in a taking:

> The Supreme Court has long since rejected any contention that denial of the use of a portion of a parcel of property is so bound up with the

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[24] 214 Mich. App. at 74; Petitioners' Appendix B-7.

[25] 28 F.3d at 1174.

[26] *Id.* at 1181.

[27] 749 F.2d 541 (9th Cir. 1984); *cert. den.* 472 U.S. 1009 (1985).

> investment-backed expectations of a claimant that government deprivation of the right to use a portion of the property in issue invariably constitutes a taking, irrespective of the impact of the restriction on the value of the parcel as a whole.[28]

Subsequently, in *Zilber v. Town of Moraga*, 692 F.Supp. 1195 (N.D. Cal. 1988), the District Court for the Northern District of California rejected an argument based on *American Savings and Loan* because the court determined it was likely not still good law in light of this Court's subsequent decision in *Keystone, supra*:

> In *Keystone*, the Supreme Court essentially rejected the *American Savings* court's notion that segments of property may be analyzed separately if a "nonuniform regulation" affects various segments differently.[29]

These two subsequent decisions from the Ninth Circuit strongly indicate that *American Savings and Loan* is no longer law in that Circuit. At a minimum, they call into question Petitioners' assertion that a conflict exists between the Michigan courts and the Ninth Circuit and that any such conflict warrants review by this Court.

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[28] *Id.* at 547.

[29] 692 F. Supp. at 1205.

CONCLUSION

The underlying opinion of the Michigan Court of Appeals, on which Petitioners base their request for certiorari, does not represent the law in Michigan concerning the proper determination of the relevant parcel in a takings case. It would seem incongruous for this Court to review an intermediate appellate court decision of limited precedential value.

Moreover, the decision of the Michigan Court of Appeals clearly falls within the parameters established by this Court for determination of the relevant parcel, arguably erring on the conservative side by excluding half of the property owned by Petitioners. *Keystone, Concrete Pipe,* and *Dolan* establish that this Court will not simply focus on the area, right, or thing alleged to have been taken without considering the potential larger whole against which to measure the economic impact of a government action. This interpretation is confirmed by numerous federal cases specifically dealing with the takings implications of wetlands regulations. *See, Deltona, Ciampitti,* and *Tabb Lakes, supra*. The various policy arguments proffered by Petitioner in an attempt to counter the lack of legal authority for their position are inapposite and do not justify deviation from an established body of law.

Similarly, the asserted conflict with the Oregon Supreme Court, the Federal Circuit and the Ninth Circuit is not supported by the cases themselves. *Boise Cascade, supra,* was decided based on takings principles contained in the Oregon Constitution and did not squarely address the relevant parcel issue. There is no conflict with the Federal Circuit because the Michigan Court of Appeals relied upon *Loveladies,* in part, and properly distinguished the underlying case from the distinctive circumstances present in that case. Finally, *American Savings and Loan* is likely no longer of any precedential value in the Ninth Circuit.

Based on the foregoing this Petition presents no issues worthy of consideration by this Court. Accordingly, MDEQ respectfully submits that the Petition should be denied.

Respectfully submitted,

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November, 1998